88-1204

Supreme Court, U.S.
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No._____

UNITED STATES SUPREME COURT

October Term, 1988

ALFRED AVINS and NORTHERN VIRGINIA LAW SCHOOL,
Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, STANLEY E. HARRISON, JOAN S. JONES, WILLIAM C. BATTLE, ROBERT L. BURRUS, WHITTINGTON W. CLEMENT, BERNARD J. HAGGERTY, RUBY G. MARTIN, HUGH L. PATTERSON, ABE J. SPERO, WILLIAM B. SPONG, Jr., STEPHEN J. WRIGHT, and ATTORNEY GENERAL MARY SUE TERRY by RICHARD C. KAST,
Respondents

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION

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370-3010

QUESTIONS PRESENTED

1. Whether a State may constitutionally make it a crime to teach the history of the United States Constitution in a law school.

2. Whether political opponents on a state regulatory board may constitutionally censor a law teacher's course because they disagree with his views in giving the course.

3. Whether a state statute which delegates unlimited control of courses in private educational institutions to a state regulatory board violates the 1st Amendment as incorporated into the 14th Amendment, of the United States Constitution.

4. Whether a state board which sets policy for state law schools and refuses to allow state law schools to accept transfer credit for a course not given therein from a non-accredited private law school because the rules of the accreditation agency prohibit accredited American law

schools from accepting transfer credit from non-accredited American law schools, although allowing transfer credit from foreigh law schools, violates the anti-trust laws and 1st Amendment (14th Amendment) rights of the students, teacher, and non-accredited law school.

5. Whether the termination of the license of a school which meets state quality standards to grant degrees because of financial inability to meet arbitrary accreditation agency requirements irrelevant to its quality or mission violates the 14th (1st) Amendment rights of the school, its teachers, and its students.

6. Whether a state review process regarding 1st Amendment rights extending over two years violates the 1st (14th) Amendment.

7. Whether the Attorney General of Virginia was properly made a party.

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REPORTS DELIVERED BELOW

The opinions of Alexandria Circuit Court and Virginia Supreme Court are annexed.

JURISDICTION

The judgment of the Virginia Supreme Court was rendered on November 22, 1988. Jurisdiction is conferred by 28 U.S.C. sec. 1257, on this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 1: "Congress shall make no law ... abridging the freedom of speech...."

Amendment 14: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code, sec. 23-267:"(2) No institution of higher education formed ... in the Commonwealth ... may confer or award degrees ... unless such institution receives approval from the Council in accordance with the provisions of this chapter."

Virginia Code, sec. 23-273: "A. Any person, firm, association, institution of higher education, trust, corporation, or other entity ... which, without approval of the Council as provided in

> this chapter, offers or confers degrees, diplomas, certificates, programs or courses of study shall be guilty of a Class I misdemeanor. Each degree, diploma, certificate, program or course of study offered or conferred in violation of this chapter .... shall constitute a separate offense."

STATEMENT OF THE CASE

Northern Virginia Law School is the first exclusively weekend law school in the United States, giving courses only on Friday nights and Saturdays. Its three founding directors, of whom petitioner Avins is one, are all conservative Republicans. Avins is also the school's administrator and a teacher therein.

The Virginia Council of Higher Education is the state agency which regulates degree-granting institutions. In 1980, that body, then composed of members appointed by a Republican administration, authorized the school to enroll students. In 1982, the school was visited by an inspection team appointed by the Council's staff, which

found that the school maintained good quality standards and substantially met the other requirements of the State for degree status. The team recommended, and the Council conferred, degree-granting power on the school, subject to certain conditions and recommendations which were later implemented. By August 1986, as a result of the election of two successive Democratic governors, the political composition of the Council, who are gubernatorial appointees, changed. At that time, the new Council refused to extend the school's license to grant degrees, allegedly on the ground that it was not making satisfactory progress towards becoming accredited. However, the Council allowed the school to continue teaching its existing students until they obtained enough credits for the J.D. degree.

In Spring 1986, petitioner Avins , in cooperation with Citizens for Reagan, an

advocacy group of conservative Republicans, agreed to teach at Northern Virginia Law School a summer program in "conservative Law", consisting of the legislative history of the 14th Amendment, using his own book, The Reconstruction Amendments Debates (Avins ed. 1967) This book is a compilation of congressional debates and readers' guide originally written under contract with and published by the Virginia Commission on Constitutional Government, an official state agency then in existence. There is no similar compilation in existence, and the school owns the back stock, and petitioners know that no similar course is given elsewhere in the United States because no orders have been received from a school for this purpose. The course was intended for students of other law schools who lack exposure to conservative legal thinking. It was labeled "conservative" because conser-

vatives believe that schools should give courses in history.

Fliers which were mailed to law students of other schools evoked considerable interest from them, but petitioners discovered a reluctance on their part to enroll because their own law schools would not permit them to transfer credits earned for taking this course to their own schools to help satisfy the requirements for obtaining a law degree. Through considerable correspondence with students and other law schools petitioners learned that this refusal to accept such transfer credits was made because of a rule of the accreditation agency, the American Bar Association, which in all cases barred transfer credits from an unaccredited American law school, although transfer credit from foreign law schools are permitted in the discretion of the receiving law school. Due to the transfer credit problem, enrollment was insufficient

to give this course in summer of 1986.

Petitioners decided to reoffer this course during summer 1987. This time, it was decided to allow, in addition to students of other law schools, the enrollment of lawyers for advanced continuing legal education credit and also students of Northern Virginia Law School as an optional (extra or elective).

In order to open the way for enrollment of students of other law schools, petitioners wrote to defendant Council in its capacity as the policy-making body for state post-secondary institutions, including the three state (accredited) law schools, asking the Council to allow transfer credit for the summer program in conservative law for students from the state law schools, notwithstanding A.B.A. prohibitory rules. The Council did not grant this request.

On May 7, 1987, acting through the Attorney General, the Council forbade petitioners from offering this course not only to

transfer students but also to the Northern Virginia Law School students still enrolled which the school had a right to teach under its prior approval to conduct a degreeprogram. This letter representing the Council from the Assistant Attorney General threatened criminal prosecution if petitioners proceeded to offer the proposed summer course in constitutional history. As a result of the Council's threat of criminal prosecution, the law school's board of directors (Avins abstaining) voted to cancel the course to avoid criminal prosecution.

The Council's refusal to renew the school's license to grant degrees was based on the fact that the school did not hire four full-time faculty, the minimum required by Southern Association of Colleges and Schools, the regional accreditation agency. In a companion administrative proceeding, it was conceded that the quality of the current part-time faculty was good, and the students

were well satisfied with them. At the time of non-renewal, the school, which is a program of adult legal education, had a total of 23 weekend students (and four taking a few courses). The full students paid $1800 a year in tuition, so the school's revenue was manifestly insufficient to employ four full-time faculty. Moreover, such employment would have resulted in egregious economic waste, since the four teachers would be kept in total idleness all week to teach one course in Friday night or Saturday.

All federal questions were raised in petitioners' initial complaint and passed upon in the opinion of Alexandria Circuit Court. (Both annexed). They were renewed in the Petition for Appeal filed in the Virginia Supreme Court. Point I stated:

> "These counts show that the Virginia licensing statutes on their face, as plaintiffs' complaint alleges, are a violation of the privilege of freedom of speech as guaranteed by the 14th Amendment. In addition, they unduly burden interstate commerce and fail to

give full faith and credit to regulatory jurisdictions of other states, as alleged. The same unconstitutional action is found in the Council's enforcement of these statutes. Schools are an exercise of freedom of speech and the right of private schools to operate is constitutionally protected. Pierce v. Society of Sisters, 268 U.S. 510 (1925)."
Petition for Appeal, p. 4

"It is just as much a violation of the First Amendment to require a school to conform to the regulations of a private organization as it would be for the state to prohibit a newspaper from publishing unless it belonged to the American Newspapers Publishers Association. It might well enhance the quality of a magazine to require it to have full-time correspondents or reporters; a magazine on Asian affairs might well be more accurate if it hired full-time reporters for duty in Singapore, Manila, Bangkok, Hanoi, Tokyo, etc., but the First Amendment utterly prohibits any such requirement, because the First Amendment, not the state, gives the magazine the right to publish. Schools are no different. The failure of NVLS to have four full-time faculty does not present a 'clear and present danger' of bringing about any evil which Virginia has the power to prohibit, and hence the state cannot require it." Petition for Appeal, p.5

"it is clear that the Virginia licensing statutes cannot pass First Amendment muster."Petition for Appeal, p.6

POINT III of the Petition for Appeal stated:

"Count II has both anti-trust and consti-

tutional claims. A state agency is not immune under the anti-trust laws merely by virtue of being such. (cases) In order to avoid the anti-trust laws, the agency must show a 'clear articulation' of state policy. (case) Since there is nothing in the Virginia code about when transfer credits shall or shall not be accepted by state law schools, the silence of the legislature and general grant of state power is insufficient to insulate the Council from anti-trust regulation." Petition for Appeal to Supreme Ct.,p.7

The Virginia Supreme Court refused the petition for appeal because "the Court is of opinion there is no reversible error in the judgment complained of." (annexed.)

REASONS FOR GRANTING THE WRIT

I. A STATE MAY NOT MAKE IT A CRIME TO TEACH THE HISTORY OF THE UNITED STATES CONSTITUTION IN A LAW SCHOOL.

A state may only suppress speech when it is

"of such a nature as to create a clear and present danger that they will bring about the substantive evils that /it/ has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919).

The fact that eight students of Northern Virginia Law School and some transfer stu-

dents will learn the history of the Fourteenth Amendment is not an evil of such magnitude as to justify a state in interposing its criminal sanction to prevent it. History is a subject commonly taught in schools, and it is therefore appropriate that legal history should be taught in a law school. The history of the Fourteenth Amendment is as significant a part of American legal history as any other part, and a state cannot prohibit teaching any period of legal history because, unlike the Soviet Union, there are no "blank spots" in American history.

There is no valid reason to make it a crime to teach legal history using The Reconstruction Amendments Debates (Avins ed. 1967). This compilation contains an exact photocopy of the relevant debates from the Congressional Globes and Records of the Reconstruction era, just like a casebook reproduces judicial opinions. It has

been cited with approval by at least three Court of Appeals opinions,[1] and was produced as an official publication of the Virginia Commission on Constitutional Government, then a state agency. The fact that the political climate in Richmond has changed since this book was published cannot justify making it a crime to teach with this book. A state cannot make the orthodoxy of 1967 into the heresy of 1987, because the First Amendment recognizes neither orthodoxy nor heresy. A compilation of the legislative debates is a useful tool in teaching legislative history, and hence the state cannot show that this book lacks relevant academic value.

The only remaining ground for forbidding this course is the teacher, petitioner Avins. His acadmic credentials are part of the

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1. Dorsey v. N.A.A.C.P., 408 F.2d 1022, 1023 (5th Cir. 1969); Adickes v. S.H. Kress & Co., 409 F.2d 121, 127-8 (2d Cir. 1968); Griffin v. Breckenridge, 410 F.2d 817, 820 (5th Cir. 1969).

record. No doubt he is the most conservative Fourteenth Amendment historian in legal academic circles, but his writings are not beyond the pale of intellectual respectability, as demonstrated by the fact that he has been cited as an authority by this Court and by several Courts of Appeals.[2/] But even if petitioner is considered at the far right of the current mainstream of legal academic thought, that is no justification for making it a crime for him to teach, because the First Amendment protects the far right, the far left, and the far out equally.

The Circuit Court (with the approval of the Virginia Supreme Court) decided that "there is no violation of Avins' First Amendment rights" because the Attorney General's letter of May 7, 1987 "does not pro-

2. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 265, n. 26 (1981); Scott v. Moore, 680 F.2d 979, 993 (5th Cir. 1982); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979).

hibit him from offering the course but does prohibit him from offering the course for credit either at the Northern Virginia Law School or for transfer to other schools." The fact that petitioner is still able to discuss the history of the Constitution from a soapbox or under a tree does not eliminate the First Amendment violation. Law students do not learn law from street corner soapbox speakers or from casual encounters in the park. They attend classes for credit, and if petitioner cannot teach in a law school for credit students will go elsewhere, eliminating petitioner's audience and making his First Amendment rights of little value. It is as much an infringement on freedom of speech to greatly disadvantage one speaker as against others of the same type as it is to infringe it in more traditional ways. Conservatives have equal rights to liberals in the nation's law schools.

The Fourteenth Amendment was passed with the explicit purpose of protecting the right to teach. Before the Civil War, a number of southern states made certain teaching a crime, and northern senators knew and denounced these laws. For example, Senator Wilson of Massachusetts observed:

> "In the State of Virginia, since I have held a seat on this floor, Mrs. Douglas was sent to the house of correction, or to the common jail, for teaching little children to read God's holy Word." Cong. Globe, 36th Cong. 1st Sess., p. 1685 (April 12, 1860) in The Reconstruction Amendments Debates, p. 27, col. 1 (Avins ed. 1967),(referring to Commonwealth v. Douglas 7 American State Trials 45 (Va. 1853)

In explaining the purposes of the first section of the Fourteenth Amendment, Representative John A. Bingham, the framer, said:

> "Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example.... of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament, ..." Cong. Globe, 42nd Cong., 1st Sess. p. 84 (March 31, 1871) in The Reconstruction Amendments Debates, p. 510 (Avins ed. 1967).

Virginia can no longer require any teacher to follow in the illustrious footsteps of Mrs. Douglas, to jail for teaching. And teachers at the university level are as much protected by the Fourteenth Amendment as are those at the elementary level. See Keyishian v. Board of Regents, 385 U. S. 589 (1967).

Censorship of teaching is fraught with peril to First Amendment rights even when the state has an interest in maintaining minimum quality standards because a degree will be awarded for work done. Where a teacher's course may have political implications, state officials ostensibly charged with maintaining quality of teaching, if politically opposed to the teacher's viewpoint, may have a hidden political agenda, to suppress political views they disagree with by alleging that the teaching is substandard. To preserve First Amendment rights, inspections for quality in schools

not funded by the state should be made by inspectors who are not opposed to the viewpoints of the teachers therein. This will guard against negative assessments of quality which in fact mask opposition to the political views of the teachers.

In the instant case, the Council of Higher Education, a state board composed of liberal Democrats, vetoed a course to be given by a conservative Republican. No inspection for quality was made, and indeed, nowhere was it asserted by the Attorney General that the course, book, or teacher was substandard. It is logical to infer that politics played a part in the decision. Censorship of a course for political reasons is not justifiable in a degree-granting institution. This is a First Amendment violation; and a Fourteenth Amendment one.

The Virginia statute, as construed by state courts, delegates unlimited discretion to the Council to disapprove courses

without giving a reason, as it did here. Such a broad delegation impermissibly chills First Amendment rights in schools subject to the Council's jurisdiction. Keyishian, supra, p. 16. To ban a course, as it did here, the statute does not require the Council to show that the course presents a clear and present danger of creating any evil that the State of Virginia may prevent. The Council may act for reasons not justifiable on First Amendment grounds. This, in itself, is a Fourteenth Amendment violation.

Finally, the record shows that petitioner's course in Fourteenth Amendment history was initiated in cooperation with Citizens for Reagan to take advantage of the public interest generated by the publicized controversy between then Attorney General Meese and several justices of this Court about the meaning and significance of legislative history in the interpreta-

tion and application of the Fourteenth Amendment. The review process in the Virginia administrative tribunals and state courts has been so lengthy that this public interest has abated. The controversy is stale and the element of timeliness has been lost. Indeed, judicial notice may be taken that Mr. Meese is no longer Attorney General and Mr. Reagan is no longer President. This demonstrates that the Virginia statute also violates the 14th Amendment, because it fails to provide a speedy method of reviewing state censorship of courses in private law schools. Even where a state may review and license speech, a lengthy delay in the process of judicial review violates First Amendment rights as embodied in the Fourteenth Amendment. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

Virginia's unjustified prohibition of petitioners' constitutional history course also constitutes an undue burden on inter-

state commerce. Because of its weekend format, petitioner's own students as well as transfer students come from other states than Virginia. Prohibiting this course therefore affects the flow of law students in interstate commerce without justification.

Finally, insofar as the Council prohibits transfer students from other law schools to study petitioners' course and transfer their credits to their own law school to aid them in receiving their own law degree under the authority of another state, it fails to give full faith and credit to the regulatory jurisdiction of another state. If, for example, a law school in California giving degrees under the jurisdiction of that state's regulatory authority, is willing to give credit for petitioners' history course, Virginia has no legitimate interest in prohibiting this. The degree would come under the authority of the State of California, and Virginia

should not be entitled to prohibit a California school from denying credit for the course even though it was given on Virginia soil. See New Jersey--Philadelphia v. New Jersey State Board, 654 F.2d 868, 887, note 29 (3rd Cir. 1981).

II. REFUSAL OF TRANSFER CREDIT IN ALL STATE LAW SCHOOLS VIOLATED THE 14th AMENDMENT AND ANTI-TRUST LAWS.

The Council's blanket refusal to allow the three state law schools to accept transfer credit for petitioners' course violated both the First Amendment as applied by the Fourteenth Amendment as well as the anti-trust laws. We have already noted that refusal of transfer credit eliminated the audience of transfer students from other law schools, and by thus restricting petitioners' audience, restricted freedom of speech of both teacher and students. Of course, a transferee school has a legitimate interest in insuring that the course meets

its quality standards, and American Bar Association accreditation standards explicitly provide that an accredited American law school may only allow credit for study in a law school outside of the United States if "the admitting school is satisfied that the quality of the educational program at the prior school was at least equal to that required for an approved school." Standard 308 (iii) ABA Standards for Approval of Law Schools. Here, the Council did not dispute the quality of petitioners' course, and a blanket prohibition of transferring credit is not justified on this ground.

The Council's adherence to the ABA rule which bans all transfers of credit from unaccredited American law schools also violates the anti-trust laws, 15 U.S.C. sec. 1-3. The restraint of trade has both economic and intellectual consequences. The inevitable effect of this ban is to prevent

unaccredited law schools from obtaining students from accredited law schools when the unaccredited law school is able to offer a course not available at an accredited law school, as here. Since a student at an accredited law school is never able to transfer the course credit to his own school in satisfaction of its degree requirements, he is inevitably deterred from taking that course. This restricts the flow of tuition to unaccredited law schools and thus restrains trade.

The ABA transfer ban also gives accredited law schools an intellectual monopoly. Where, as here, the conservative law course is only offered in an unaccredited law school, a student at an accredited law school cannot take it for credit, and thus is exposed only to the liberal point of view. Liberals are not entitled to a monopoly in the teaching of constitutional law or history.

The Circuit Court correctly exercised

jurisdiction over defendants to decide the anti-trust questions. Damages were not sought and the exclusive jurisdiction of federal courts to award treble damages was not involved. Cf. Nash Co. Board of Education v. Biltmore Co, 640 F.2d 484, 489, n. 11 (4th Cir. 1981). Petitioners sought a declaratory judgment, which the state court was not precluded by Congress from rendering, and the injunction requested was ancillary to that. Whatever the jurisdiction over private parties, the requirements of federalism would require that a state court should be allowed to insure that state agencies do not transgress legal rules and thus create potential treble damage liability in federal court.

However, the Circuit Court erroneously held the Council immune under the "state action" exception. In order to avoid the anti-trust laws, the state agency must show a "clear articulation" of state policy.

Community Communications Co. v. Boulder, 455 U.S. 40, 43 (1982). A state agency is exempt only if there is a

> "state policy to displace competition with regulation or monopoly public service." Town of Mallie v. Eau Claire, 471 U.S. 34, 39((1985).

There is no legislative policy governing transfer of credits from a private to a state law school; the Virginia Code is silent on this. Hence the Council is not exempt or immune from anti-trust laws.

III. TERMINATION OF DEGREE AUTHORITY BECAUSE OF LACK OF FOUR FULL-TIME TEACHERS WAS UNCONSTITUTIONAL.

Schools are an exercise of freedom of speech and the right of private schools to operate is constitutionally protected. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Regulation of degree-status of a school has been justified

> "in protecting both the consumers of education and the public which may rely upon the certification of proficiency implicit in the award of a degree."

New Jersey--Philadelphia v. New Jersey State Bd., 654 F.2d 868, 887 (3rd Cir. 1981). That is irrelevant here. In the administrative hearing, the Council did not dispute the school's evidence that its teaching was standard and conceded that the school met state educational quality standards. Cases involving "diploma mills" or substandard schools are not in point.

The requirement that a purely weekend school should hire four teachers to sit in total idleness all week is purely arbitrary. Moreover, it is unconstitutional. By analogy, it might well enhance the quality of a magazine or newspaper to require it to hire a set number of full-time reporters or writers, but the First Amendment prohibits any such requirement because the First Amendment, not the state, gives it the right to publish. Schools are no different. The failure of N.V.L.S. to have four full-time faculty does not present a "clear and pre-

sent danger" of bringing about any evil which Virginia can prohibit, so the state cannot require it.

The fact that the full-time faculty requirement was imposed by Southern Association, the regional accreditation agency, rather than by the Council directly, does not change the constitutional rule. The letter of March 10, 1988 from U.S. Assistant Secretary for Postsecondary Education C. Ronald Kimberling states that the United States Department of Education

> "does not currently evaluate in any detail the substantive educational or training standards used by accrediting agencies to assess educational quality or achievement." (page 9, in record).

Specifically referring to the full-time faculty requirement of Southern, he said:

> "The Department of Education makes no determination that adherence to either of these standards is essential to a program of minimum educational quality....." (page 12, in record)

Therefore, Virginia cannot rely on any federal determination that adherence to ac-

creditation standards is necessary to insure minimum educational quality.

While accreditation agencies are private organizations, since the Council required the school to conform to its rules, as a condition of retaining its license, those rules are "state action" for 14th Amendment purposes. Terry v. Adams, 345 U.S. 461 (1953). Since the Attorney General through her assistant also cooperated in enforcing the unconstitutional statute, petitioners were entitled to make her a party to enjoin her from doing so. Ex Parte Young, 209 U.S. 123 (1908); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED AVINS
Attorney for Northern Virginia Law School and
Petitioner pro se

January 21, 1989

COUNT I: PETITION OF COMPLAINT

1. Plaintiff Northern Virginia Law School Inc. is a Virginia corporation located in Alexandria and engaged in a program of part-time, weekend legal education.

2. Plaintiff Avins is a faculty member and administrator of and one of the directors of, Northern Virginia Law School.

3. Plaintiff Avins and the other directors of Northern Virginia Law School are conservative Republicans.

4. The Virginia Council of Higher Education is the regulatory agency for degree-granting schools in Virginia pursuant to Virginia Code sec. 23-267, and defendants above-named were its members during the relevant period alleged herein, and acted under color of state law as alleged herein.

5. Defendants are liberal Democrats appointed by Democratic Governors Robb and Balilies, and acted as individuals using


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their state positions under color of law, and plaintiffs incorporate by reference the whole record, both administrative and materials filed in this Court, in CH 87-18065, herein, as if set forth in extensio here.

6. Plaintiff school was granted provisional degree-granting authority in 1982 by then Council of Higher Educatior members who had been appointed during a Republican state administration.

7. In 1986, The Council, after its change in political composition, as above stated, declined to renew the license of Northern Virginia Law School to grant degrees, on the alleged ground that it was not making satisfactory progress towards accreditation, but permitted the school to continue teaching its students then enrolled under its existing license.

8. In Spring 1987, plaintiff Avins proposed to offer at plaintiff school for a summer session a second course in "conser-

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vative law" consisting of the legislative history of the 14th Amendment to the United States Constitution, using his own book, The Reconstruction Amendments Debates. This course was to be an optional for the Northern Virginia Law School students, who would receive credit for its degree, and attendance of students of other schools or bar members would be certified to that school or a continuing legal education program so that credit could be awarded if the other school or bar program so desired. This course is not given in any other school in the United States.

9. On May 7, 1987, acting through the Attorney General, defendants forbade plaintiffs from offering said course, and threatened them with criminal prosecution if plaintiffs offered this course.

10. As a result of this threat, said course was cancelled by decision of the other directors of Northern Virginia Law

School.

11. The action of defendants interfered with the contractsand prospective contracts of plaintiffs, causing plaintiff Avins to lose a teaching fee of $500 and the school to lose $1600 in tuition for said course.

12. In prohibiting plaintiffs from offering this course defendants refused to inspect either this course or examine the qualifications of plaintiff Avins to give it, and did not arrange a decision by any inspector not politically opposed to said course.

13. Plaintiff Avins meets the generally accepted qualifications for law school teachers and is qualified to give this course, which meets generally accepted standards for courses bearing credit in law schools throughout the United States.

14. The action of defendants violated 42 U.S.C. sec. 1983 because Virginia Code, sec. 23-267 to 23-273, under color of which

they acted, is unconstitutional as applied to plaintiffs in this matter since it (a) violates the 14th Amendment (1st Amendment); (b) places an undue burden on Interstate Commerce in violating the rights of the school and its students and plaintiff Avins who both travel in interstate commerce; and (c) insofar as it prohibits transferring credit fails to give Full Faith and Credit to the regulatory jurisdiction of other states over their degree-granting schools.

WHEREFORE, on this count plaintiffs demand: (a) A declaratory judgment that defendants' acts were unconstitutional; and (b) An injunction prohibiting defendants from interfering with plaintiffs' teaching and curriculum; and (c) Damages for Avins of $500 and for Northern Virginia Law School of $1600.

COUNT II.

15. Repeats paragraphs 1-13.

16. The Council is the supervisory authority which sets policy for state post-secondary institutions, pursuant to Virginia Code sec. 23-9:6:1, including the three state law schools (University of Virginia, William & Mary, and George Mason).

17. Virginia state law schools will not accept transfer credit from Northern Virginia Law School, and as a result, students of those law schools are deterred from taking the summer course in conservative law since they cannot transfer credit from such course to their own schools to count towards degree credit at their own law schools.

18. No course comparable to the summer program in conservative law is offered in any state law school, so the lack of ability to transfer credit deprives Northern Virginia Law School of the opportunity of attracting visiting students from state law schools and deprives credit-seeking law students from these schools of the ability to

take this course anywhere in the state for credit towards their degree.

19. The refusal of the state law schools to accept transfer credit is based on rules of the American Bar Association, the accrediting agency, which prohibits transfer of credit from a non-accredited law school to an A.B.A.-accredited law school.

20. On June 6, 1987, plaintiffs applied to defendants to have said transfer credit granted at state law schools, in time for the summer course of 1987, but defendants, by ignoring said application, denied it.

21. Such A.B.A. rules prohibiting credit transfer constitute an unlawful combination in restraint of trade in violation of 15 U.S.C. sec. 1-3 and violate the 14th Amendment (1st Amendment) rights of plaintiffs and transfer students, and defendants' actions in enforcing said rules also have this effect.

WHEREFORE, plaintiffs demand a declaratory judgment that transfer credit shall be granted and an injunction restraining defendants from refusing transfer credit at state law schools of the summer program in conservative law.

COUNT III.

22. Repeats paragraphs 1-7.

23. The actions of defendants in refusing to renew plaintiff law school's license were contrary to Virginia statute in that said Council failed to demonstrate by clear and convincing evidence that plaintiff law school was no longer meeting minimum state standards for institutional operation as required by Virginia Code sec. 23-271.c.1.

24. Defendants' "stipulation" that plaintiff school should progress towards accreditation as a condition of retaining its license to grant degrees is contrary to Virginia Code, sec. 23- 268,269, which

requires defendants to grant provisional approval to schools which maintain minimum standards.

25. Insofar as the Virginia Code permits only the operation of accredited schools it violates the 14th Amendment (1st Amendment) and is also procedurally unconstitutional in failing to afford an expeditious determination of whether a school meets standards for licensure.

26. The actions of defendants occurred after plaintiffs had proposed to offer a first "conservative summer law program" and after alumni and students of plaintiff school had petitioned the legislature for bar examination privileges, which defendants opposed, and the action of defendants in terminating the license to grant degrees violated the rights of speech and petition guaranteed by the 14th Amendment.

WHEREFORE, plaintiff school demands a

declaratory judgment and injunction requiring the defendants to continue its provisional approval.

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March 29, 1988

COMMONWEALTH OF VIRGINIA: CIRCUIT COURT OF ALEXANDRIA

Re: Avins et al v. Virginia Council of Higher Education et al, Chancery No. 18065

Letter Opinion of Judge Alfred D. Swersky
February 26, 1988

This matter is before the Court on Defendants' Demurrers to the four count "Petition of Complaint".

The cause of action alleged against the Attorney General of Virginia (Terry) and the Virginia Council of Higher Education (Council) arises out of action taken by the Council when it "declined to renew the license of the Northern Virginia Law School" (para. 7, Petition). Further, the Petition alleges that Terry threatened criminal prosecution if Complainant Avins offered a course in "conservative law" for credit (para. 8, Petition).

From these actions comes a " Petition of Complaint" alleging that the actions of Defendants were unconstitutional and re-

questing an injunction and damages under Title 42, U.S.C. § 1983; that the actions of the Council constitute an unreasonable restraint of trade in violation of certain anti-trust statutes (Title 15, U.S.C. §§ 1-3); that the actions of the council were contrary to the Virginia statutes setting standards for institutional operation (Title 23, Code of Virginia, § 268, et seq.); and appealing the actions of the Council.

Defendant Terry, named only in Count One, demurs on the grounds that the Petition fails to allege her personal involvement in the claimed violation of Title 42, U.S.C. § 1983. The Demurrer must be sustained.

The only allegations of her personal involvement are found in paragraphs 5 and 9 of the Petition. Terry is alleged to be "a liberal Democrat" and to have act-

ed through an Assistant Attorney General to enforce the mandates of the Defendant Council. Further, it is alleged that, acting on behalf of the Council, she "forbade Plaintiffs from offering said course (Conservative Law) and threatened them with criminal prosecution..." Such allegations are insufficient as a matter of law to impose personal liability on Defendant Terry, It is clear that the doctrine of Respondeat Superior does not apply to actions under Section 1983 and no facts of Terry's personal involvement are alleged. Vinnedge v. Gibbs, 550 F. 2d 926 (4th Cir. 1977). Since no other facts as to Terry's involvement can be alleged, the Complaint will be dismissed as to her and Plaintiff's objections to this ruling will be noted.

The Demurrers of Defendant Council to Counts One, Two, and Three will be sustained for the following reasons.

Count One alleges a violation of Title 42, U.S.C. § 1983 by the Council. The Council is not a person within the meaning of § 1983 and, despite Plaintiff's arguments to the contrary, the individual members of the Council are not named as Defendants in this cause. Further, there are no facts alleged from which the Court could find or even reasonably infer that a violation of Plaintiffs' constitutional rights has occurred. With respect to the failure to renew the provisional license of the school no allegation is made that the Council nor any member acted illegally, unlawfully, or unconstitutionally in arriving at the decision not to renew. With respect to the allegations concerning the conservative law course, no allegation is made that the Council acted beyond the scope of its duties. In fact, the letter of the Assistant Attorney General of May 7, 1987,

does not prohibit Avins from offering the course but does prohibit him from offering the course for credit either at the Northern Virginia Law School or for transfer to other schools. From this, there is no violation of Avin's First Amendment rights. See, Shelton College v. State Board of Education, 226 A.2d 612 (New Jersey,1967).

Count Two alleges that the actions of the Council constitute violations of the anti-trust laws found in Title 15 U.S.C. § § 1-3 in that they prohibit the transfer of credits from the Plaintiff school to others. Plaintiff alleges that the rules of the American Bar Association, (ABA), the basis for the refusal to accept transfer credits, constitute a violation of the anti-trust laws as well as violations of Plaintiffs' First Amendment rights. Council demurs to Count Two, relying on immunity from anti-trust actions under the "State Action Doctrine" as set down in Par-

ker v. Brown, 317 U.S. 350 (1942). Plaintiffs argue that under Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), they are entitled to a trial on the merits of Count Two.

However, nothing could more clearly be state action than the education of a state's citizen. Even without the clearly enunciated state policy as set forth in Title 23, Code of Virginia, § § 265, et seq., there could be no doubt that education, even higher education, and its regulation is a matter of direct state action by the legislature. Therefore, the Demurrer to Count Two will be sustained and that Count dismissed, The objections of the Plaintiffs are noted.

Count Three alleges that the Councils' actions were "contrary to Virginia Statute" in that there was no demonstration that Plaintiffs' school was "no longer meeting

minimum state standards for institutional operation (para. 23, Petition) and that under Virginia's statutory scheme the Council could not require "progress toward accreditation as a condition of retaining its license (para. 24, Petition). Also it is alleged that the statutory scheme is unconstitutional for its failure to afford " an expeditious determination of whether a school meets standards for licensure (sic)" (para. 25, Petition).

Plaintiff argues that under Title 23, Code of Virginia, § 269, the Council could not grant a provisional approval and impose both a time limit and conditions of it its being granted. Plaintiff relies on the wording of the statute which states in pertinent part

> ...the Council may establish the term or period of time for which such approval is granted or may specify certain conditions under which it is granted. Va. Code Ann. § 23-269B)(Emphasis added.)

Therefore, Plaintiff concludes that the Council could not impose as a condition the making of satisfactory progress toward accreditation and set a time limit for the expiration of the provisional approval.

Further, Plaintiff argues that the only condition that can lawfully be imposed is the meeting of "minimum standards" as set forth in Section 23-268 of the Code which reads in pertinent part

> The Regulations [adopted by the Council] ... shall contain standards designed (1) to insure that all institutions of higher education which are subject to the provisions of this chapter meet minimal academic standards.

In April of 1982, according to the record of this case, Plaintiff school was granted approval to confer the Juris Doctor degree provided that it seek accreditation as set forth in the statute (§ 23-269) from the ABA

or other approved accrediting body.

Further, Council conditioned any extension of the time of the provisional approval only upon a showing that the school had "reasonable prospects of gaining full accreditation during the period covered by such extentions." (See, letter of Council, April 8, 1982). Thus, the Council did not impose conditions under which approval was granted but set conditions under which the time could be extended, i.e., the making of satisfactory progress toward accreditation. (See, letters of Council, April 5, 1984; May 2, 1985). The condition that the institution receive accreditation by the ABA or other approved body is statutory and was not imposed by the Council. It is imposed by the law. The school would have had to seek this accreditation even if the Council did not specify it in its approval. Clearly under the statutory scheme and the regulations of the Council it could impose conditions for

extending the time of its provisional approval and there is nothing inappropriate in requiring satisfactory progress toward statutorily-mandated accreditation. Further, it should be noted that there is no allegation that the limitation Plaintiffs argue exists in the statute was ever called to the attention of the Council; that is, no objection was ever made to the Council that it could not impose such conditions.

Plaintiffs' reading of Section 23-270, hardly makes sense. Under its reading of the statute the Council could have only fixed the time for which provisional approval was granted and not extended it. At the conclusion of that time, if the institution had not obtained the requisite accreditation the provisional approval would expire. Plaintiff, having availed itself of the extentions of time because of its assertion that it was making progress, is hardly in a position to complain that the Council

exceeded its authority.

Plaintiff's argument that minimal academic standards require something less than the Council mandates must likewise fail. The Regulations adopted by the Council pursuant to the legislative direction (§ 23-268) clearly set forth "minimal academic standards" to be maintained for provisional approval. See, Regulations Governing Approval of Certain Institutions to Confer Degrees, Diplomas and Certificates, July 1, 1980, Standards for Institutional Approval.

The Demurrer to Count Three must be sustained and this Count Dismissed. The objections of Plaintiffs should be noted.

Count Four presents an appeal of Council's actions under Section 9-6.14:16 of the Code of Virginia and, hence, is not subject to Demurrer. Defendant Council has filed what it considers to be the administrative record in this matter pursuant to Section 9-6.14:17 and Plaintiffs have objected to its lack of

completeness. If counsel can not agree on the contents of the record the statute permits the supplementation of the record and, if necessary, a hearing can be held on those items to which objections are made.

Mr. Kast should prepare an appropriate Decree in accordance with the rulings of the Court.

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

Alfred Avins & Northern Virginia Law School, Inc.,
v.
Virginia Council of Higher Education, et al.,
and
Stanley E. Harrison, et al.,
Chancery No.'s 18065 and 18406

FINAL DECREE

In the foregoing consolidated case, upon the pleadings, exhibits, and briefs filed, together with the administrative record with affidavits and exhibits annexed, the Court:

(1) Sustains, without leave to amend, the demurrers filed by defendants in response to Counts I, II, and III of Chancery No. 18406, for the reasons set forth in its letter

opinion of February 26, 1988.

(2) Pursuant to Virginia Code S 9-6.14:19, remands this matter to the State Council of Higher Education for the limited purpose of the Council articulating the objective basis it used for determining that the Northern Virginia Law School failed to make satisfactory progress toward accreditation. The Council shall take further evidence on this issue and articulate that objective basis in writing, and notify the plaintiffs thereof.

(3) Dismisses all remaining allegations raised by plaintiffs in this consolidated case.

(4) Denies plaintiffs' motion to restore the authority of the Northern Virginia Law School to grant the J.D. degree pending the outcome of this litigation.

And it is according so ADJUDGED, ORDERED AND DECREED this 11th day of August, 1988,

and this matter is dismissed and stricken from the Court's docket. The clerk shall, upon entry, provide copies of this Final Decree to counsel of record.

SUPREME COURT OF VIRGINIA: November 22, 1988

Alfred Avins, et al, Appellants,

-against-

Virginia Council of Higher Education etc., et al., Appellees.

Record No. 880939: Circuit Court Nos. C-18065 and C-18406

From the Circuit Court of the City of Alexandria

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal and denies the appellant's motion for certification.